

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

September 20, 2000

**IN RE:**

**JOINT APPLICATION OF THE CITY OF  
KINGSPORT AND TENGASCO PIPELINE  
CORPORATION FOR APPROVAL OF  
CITY RESOLUTION AND CITY ORDINANCE**

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**DOCKET NO. 00-00537**

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**ORDER GRANTING INTERVENTION TO UNITED CITIES AND APPOINTING  
PRE-HEARING OFFICER**

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This matter came before the Tennessee Regulatory Authority (the "Authority" or the "TRA") at the regularly scheduled Authority Conference held on August 15, 2000 for consideration of a petition to intervene and for a public hearing (the "Petition") filed by United Cities Gas Company ("United Cities") in connection with the joint application (the "Application") of the City of Kingsport ("Kingsport") and Tengasco Pipeline Corporation ("Tengasco") (collectively the "Applicants") in this docket.

**Background**

On June 20, 2000, Kingsport and Tengasco filed their Application for approval by the Authority of a Kingsport resolution (the "Resolution") and ordinance (the "Ordinance"). The Resolution, which was passed by the Mayor and Board of Aldermen of the City of Kingsport on May 2, 2000, states that the public necessity requires a competing gas pipeline company in the City of Kingsport and requires that Tengasco construct such facilities.<sup>1</sup> The Ordinance, which was enacted on June 6, 2000, authorizes execution of a

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<sup>1</sup> Application, June 20, 2000, Exhibit A, at 2.

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non-exclusive franchise agreement between Kingsport and TENGASCO for TENGASCO to provide natural gas service within and outside the City of Kingsport.<sup>2</sup> The Application further states as follows:

Upon approval of the Resolution and Ordinance as requested hereby, [TENGASCO] moves pursuant to TCA Section 65-4-207 the TRA grant to [TENGASCO] without further hearing, a certificate of public convenience and necessity to provide intrastate natural gas service in Sullivan County, Tennessee in which the City of Kingsport is located.<sup>3</sup>

United Cities filed its Petition on July 7, 2000. United Cities requests that the Authority allow it to intervene as an interested party, pursuant to Tenn. Code Ann. § 4-5-310. United Cities also requests that a public hearing be held pursuant to Tenn. Code Ann. § 65-4-204 before the Authority takes any action on the Application.

On July 24, 2000, the Applicants filed a Joint Response (the “Response”) to United Cities’ Petition, in which they state that the Petition should be denied. On August 1, 2000, United Cities filed a Reply (the “Reply”) to the Applicants’ Response, in which United Cities further argues in support of its request for intervention and a hearing.

### **Positions of the Parties**

According to its Petition, United Cities has a Certificate of Public Convenience and Necessity (“CCN”) for Sullivan County.<sup>4</sup> United Cities also has a non-exclusive franchise from Kingsport for service to Kingsport and surrounding areas, a franchise from Sullivan County for service to that County, and franchises from other municipalities in Sullivan County pursuant to which it serves Bluff City, Bristol, and the surrounding areas.<sup>5</sup> United

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<sup>2</sup> Application, June 20, 2000, Exhibit B, at 2.

<sup>3</sup> Application, June 20, 2000, at 1.

<sup>4</sup> United Cities’ Petition, July 7, 2000, at 2.

<sup>5</sup> United Cities’ Petition, July 7, 2000, at 2.

Cities states that it is currently the only natural gas company serving the City of Kingsport and the surrounding areas.<sup>6</sup>

United Cities states that TENGASCO, through its application for a CCN, is about to interfere with the existing route, line, and system of United Cities, and that United Cities is therefore entitled to a hearing pursuant to Tenn. Code Ann. § 65-4-202 to determine the necessity of additional service in the affected territory.<sup>7</sup> United Cities adds that because its legal rights and interests may be determined in this proceeding, United Cities should be allowed to intervene in this proceeding.<sup>8</sup>

Tenn. Code Ann. § 65-4-202 provides that:

If any public utility, in establishing, constructing, reconstructing, or extending its route, line, plant or system, shall interfere or be about to interfere with the existing route, line, plant, or system of any other public utility, the authority, on complaint of the public utility claiming to be injuriously affected, may, **after hearing**, make such order and prescribe such terms and conditions in harmony with this part as are just and reasonable. (Emphasis supplied).

This section further provides that the Authority, after a hearing, shall have power to issue a CCN, refuse to issue a CCN, or issue a limited or conditional CCN.

United Cities offers as additional grounds for intervention the requirement in Tenn. Code Ann. § 65-4-203 of notice to all public utilities operating in the municipality or territory affected by a request for a CCN.<sup>9</sup> United Cities also cites Tenn. Code Ann. § 65-4-204, which provides for a public hearing on an application for a CCN upon written application of any party in interest.<sup>10</sup> Stating that it is a party in interest, United Cities requests a public hearing at which TENGASCO “should be required to file engineering plans

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<sup>6</sup> Reply, August 1, 2000, at 6.

<sup>7</sup> United Cities’ Petition, July 7, 2000, at 3.

<sup>8</sup> United Cities’ Petition, July 7, 2000, at 3.

<sup>9</sup> United Cities’ Petition, July 7, 2000, at 3.

<sup>10</sup> United Cities’ Petition, July 7, 2000, at 3.

and other information which the TRA may request to assist the TRA in making its decision to grant, qualify, or deny” the CCN requested by Tengasco.<sup>11</sup>

In their Response, the Applicants argue, on the basis of Tenn. Code Ann. § 65-4-207, that the determination stated in the Resolution and Ordinance precludes United Cities’ claim of interference under Tenn. Code Ann. § 65-4-202 and request for a hearing under Tenn. Code Ann. § 65-4-204 on Tengasco’s application for a CCN.<sup>12</sup> Tenn. Code Ann. § 65-4-207(a) reads as follows:

The provisions **of this part** do not apply where any municipality or county by resolution or ordinance declares that a public necessity requires a competing company in that municipality or county. (Emphasis supplied).

In other words, the Applicants argue that because the Ordinance and Resolution have declared that the public necessity requires a competing company in Kingsport, Tenn. Code Ann. §§ 65-4-202 through 65-4-206, which would allow United Cities to claim interference and request a hearing, are inapplicable.

In their Response, the Applicants make no further reference to an application for a CCN, pursuant to Tenn. Code Ann. § 65-4-201, although such a request is made in the Application. Instead, their Response refers only to the Applicants’ request for approval of a franchise pursuant to Tenn. Code Ann. § 65-4-107. Although the Applicants do not deny that Tenn. Code Ann. § 65-4-107 requires a hearing for approval of a franchise—indeed they quote the language that expresses this requirement<sup>13</sup>—the Applicants draw a distinction between a franchise hearing and a CCN hearing. They state that:

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<sup>11</sup> United Cities’ Petition, July 7, 2000, at 3-4.

<sup>12</sup> Applicants’ Response, July 24, 2000, at 2.

<sup>13</sup> Applicants’ Response, July 24, 2000, at 2.

United Cities' Petition is an attempt to transform this proceeding from one approving a city franchise agreement under Section 65-4-107 into a full-blown certificate proceeding under Sections 65-4-201—206 which is directly contrary to Section 65-4-207.<sup>14</sup>

Arguing that the Legislature clearly made franchise hearings different from CCN hearings, the Applicants state that the only proper procedure in this matter is for the Authority to consider the Application in accordance with Tenn. Code Ann. § 65-4-107. According to the Applicants, the Authority need only “approve [the] franchise[] and other privileges upon making the findings stated [in the Ordinance and Resolution] which are supported by [the Application] and to which United Cities has not made any objection.”<sup>15</sup> The Applicants further state that a hearing on a CCN would be unnecessary because Tengasco already has a CCN to serve adjacent counties and that Tengasco is not seeking approval for service in any area outside the City of Kingsport.<sup>16</sup>

The Applicants' final argument is that, even if Tenn. Code Ann. § 65-4-202 were not rendered inapplicable under Tenn. Code Ann. § 65-4-207, United Cities cannot make a valid claim of interference pursuant to Tenn. Code Ann. § 65-4-202 because United Cities holds only a non-exclusive franchise from the City of Kingsport. “Consequently,” the Applicants argue, “any claim of interference by United Cities with its nonexclusive franchise is unfounded and does not justify any reliance on Section 65-4-202, even if that section applied.”<sup>17</sup>

In its Reply, United Cities points out that the Application seeks authorization that is broader in scope than the authorization stated in the Resolution.<sup>18</sup> As United Cities states,

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<sup>14</sup> Applicants' Response, July 24, 2000, at 2.

<sup>15</sup> Applicants' Response, July 24, 2000, at 2.

<sup>16</sup> Applicants' Response, July 24, 2000, at 2.

<sup>17</sup> Applicants' Response, July 24, 2000, at 3.

<sup>18</sup> United Cities' Reply, August 1, 2000, at 3-4.

“the only finding of public necessity made by the City of Kingsport relates solely to the construction of a pipeline in Kingsport exclusively for the purpose of transporting intrastate natural gas to large volume industrial customers in Kingsport . . .”<sup>19</sup> “Therefore,” United Cities argues,

The only portion of [Tengasco’s] application that is exempt, under Tenn. Code Ann. § 65-4-207, from the certificate provisions, is that portion of [Tengasco’s] application which seeks authority to build a pipeline in Kingsport to transport intrastate natural gas to Kingsport’s large volume industrial customers . . . The remainder of [Tengasco’s] application, which seeks authority to use the Kingsport pipeline to transport both interstate and intrastate gas to Kingsport residential customers and to large volume industrial users in surrounding areas, cannot be approved without complying with the certificate provisions in Tenn. Code Ann. § 65-4-201 – 206.<sup>20</sup>

Finally, United Cities argues that in any event Tenn. Code Ann. § 65-4-107 requires a hearing before approval of Tengasco’s franchise and that at such a hearing the Authority

must ascertain the precise scope of the Kingsport ordinance and resolution, and determine whether the franchise granted by the City of Kingsport is required by public convenience and necessity, and what limitations or conditions, if any, should be placed on that franchise.<sup>21</sup>

### **Findings**

At this stage, the Applicants’ filings are unclear as to what action they seek from the Authority. At the very least, their Response to the Petition confirms that they seek Authority approval of the franchise pursuant to Tenn. Code Ann. § 65-4-107, but the Response suggests that the Applicants may no longer be seeking the granting of a CCN. The Applicants have stated that a “full-blown” CCN hearing is not appropriate, on the grounds that Tenn. Code Ann. § 65-4-204 is inoperable. This position neglects the requirement for a hearing in Tenn. Code Ann. § 65-4-201, but the Applicants have not

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<sup>19</sup> United Cities’ Reply, August 1, 2000, at 3.

<sup>20</sup> United Cities’ Reply, August 1, 2000, at 4.

<sup>21</sup> United Cities’ Reply, August 1, 2000, at 5.

indicated a definite conclusion that that section is inoperable as well by withdrawing their application for a CCN.

As United Cities points out, the Applicants' filings are also unclear as to the geographical area for which Tensasco seeks Authority approval. The Resolution of May 2, 2000 contemplates service by Tensasco "in the City of Kingsport . . . to large volume industrial customers such as Eastman Chemical Company."<sup>22</sup> The Ordinance of June 6, 2000, grants Tensasco a franchise to sell gas "to the City and inhabitants, institutions and businesses thereof" and "through the City to inhabitants, institutions and businesses outside the corporate boundaries."<sup>23</sup> The Application seeks a CCN "to permit [Tensasco] to provide natural gas services within Sullivan County."<sup>24</sup> Yet the Applicants, in their Response to United Cities' Petition, state that Tensasco "hereby confirms that no approval is sought in this proceeding for service to Bluff City, City of Bristol, or any area in Sullivan County other than to serve the City of Kingsport."<sup>25</sup>

The Authority finds that the Applicants should clarify their Application to explain whether they are still seeking a CCN from the Authority. The Applicants should also clarify the scope of the geographical area which Tensasco seeks approval to serve, since, as United Cities argues, this may dictate the conduct of this proceeding. In addition, United Cities should have the opportunity to respond to the Applicants' clarification.

Despite the lack of clarity as to the Application, the Authority is still in a position to act upon United Cities' request for intervention and a hearing. Even if, as the

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<sup>22</sup> Application, June 20, 2000, Exhibit A, at 2.

<sup>23</sup> Application, June 20, 2000, Exhibit B, at 2.

<sup>24</sup> Application, June 20, 2000, at 2.

<sup>25</sup> Applicants' Response, July 24, 2000, at 2.

Applicants argue, all of Part 2 of Title 65, Chapter 4 is rendered inoperable by the Resolution and Ordinance, Tenn. Code Ann. § 65-4-107 still mandates a hearing on the Applicants' request for approval of the franchise. And, pursuant to Tenn. Code Ann. § 4-5-310, United Cities is permitted to request intervention in such a proceeding.

Likewise, even if Tenn. Code Ann. § 65-4-202 is not the proper avenue for United Cities to state the manner in which its rights are affected, United Cities has nevertheless stated grounds for intervention pursuant to Tenn. Code Ann. § 4-5-310, which provides, in pertinent part, that:

(a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:

- ....
- (2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and
- (3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.

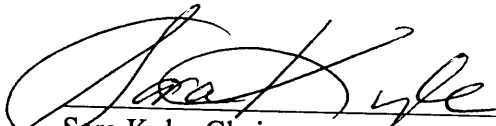
United Cities has demonstrated that its rights, duties, and interests may be affected by the Authority's action on the Application. Therefore, United Cities should be granted intervention as to the Applicants' request for approval of the franchise.


Accordingly, at the regularly scheduled Authority Conference held on August 15, 2000, the Directors voted unanimously to convene a contested case in this matter and to appoint the General Counsel or his designee as Pre-Hearing Officer and to grant United Cities' Petition to Intervene. The Directors also unanimously agreed that the Applicants should submit a clarification of the actions they request the Authority to take, as well as the legal bases therefor, including a clarification on the issue of whether a CCN is being requested and a clarification of the geographical area Tengasco proposes to serve.

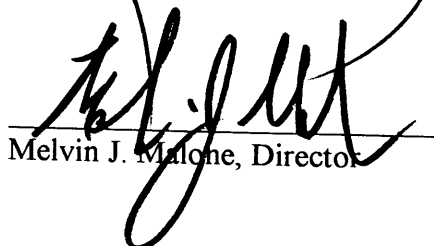


**IT IS THEREFORE ORDERED THAT:**

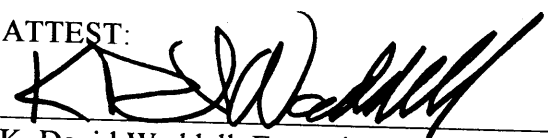
1. A contested case is hereby convened for the purpose of acting on the Application of Tensasco and the City of Kingsport;
2. The General Counsel or his designee is appointed Pre-Hearing Officer in this matter for the purpose of hearing preliminary matters prior to hearing and establishing a procedural schedule to completion;
3. The Petition of United Cities Gas Company to intervene in this matter is granted as to the Application of Tensasco and the City of Kingsport for approval of the Resolution and Ordinance;
4. Tensasco and the City of Kingsport shall file an amended Application clarifying those areas set forth in this Order and United Cities Gas Company shall file a response thereto; and
5. Any party aggrieved with the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within fifteen (15) days from the date of this Order.

  
Sara Kyle, Chairman

  
H. Lynn Greer, Jr., Director

  
Melvin J. Malone, Director

ATTEST:

  
K. David Waddell, Executive Secretary